84-534

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No. 84-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HUGH JAMES QUIGLEY,

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF FLORIDA SECOND JUDICIAL DISTRICT

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54pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the effective date of the Federal Home Loan Bank Board's due-on-sale Regulation 12 C.F.R. 545.8-3(f) is June 8, 1976 or July 31, 1976.

2. Whether Regulation 12 C.F.R. 545.8-3 (f) preempts the equity jurisdiction of Florida courts.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

HUGH JAMES QUIGLEY,

Petitioner,

v.

FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION OF WINTER HAVEN,

Respon[illegible]

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, SECOND DISTRICT

The Petitioner, Hugh James Quigley, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Second District Court of Appeal of Florida, the state court of last resort. Petition for Review was denied by the Florida Supreme Court on July 5, 1984.

OPINIONS BELOW

The Circuit Court of Polk County, Florida, entered a final summary judgment for petitioner on May 9, 1983. The Second District Court of Appeal of Florida entered its judgment on denial of petition for rehearing, which reversed the summary judgment of the trial court, on February 29, 1984. First Federal Savings and Loan Association v. Quigley, 445 So. 2d 1052 (Fla. 2nd DCA 1984). The Florida Supreme Court denied petition for review on July 5, 1984. Quigley v. First Federal Savings and Loan Association, Case No. 65,115.

JURISDICTION

Pursuant to denial of the petition for review by the Florida Supreme Court, the decision of the Second District Court of Appeal of the state of Florida became a "final judgment*** rendered by the highest court of a State in which a decision could be had***" pursuant to the provisions of 28 U.S.C. Section 1257.

The jurisdiction of the court is invoked under the provisions of 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This petition involves the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution, Federal Home Loan Bank Board Regulation 12 C.F.R. §545.6-11, 12 C.F.R. §545.8-3(f) and (g), Federal Home Loan Bank Board Resolution 76-296, and Florida Statutes §§702.01 and 45.031 (1981).

STATEMENT OF THE CASE

On July 23, 1976, Jack Cobb and Lillian Cobb (hereinafter "COBB") executed and delivered a mortgage encumbering certain real property to the respondent, First Federal Savings and Loan Associaion of Winter Haven ("FIRST FEDERAL"). Paragraph seven(7) of the mortgage contained the following lanuage:

> "No conveyance of said property, or any part thereof, shall be made by mortgagor without the written consent of mortgagee and without assumption by the grantee in the form prescribed by mortgagee of the obligation to mortgagee hereunder; in any event mortgagee may, upon such conveyance by mortgagor, deal directly with mortgagor's grantee without any notice mortgagor in all respects pertaining to this mortgage, and may forbear to sue or may extend times for payment of the debt secured hereby withourt discharging or in any way affecting the liability of mortgagor hereunder."

On August 25, 1982, the petitioner, Hugh James Quigley ("QUIGLEY"), contracted to purchase the Cobbs' home.

Quigley applied to First Federal for approval of assumption of the mortgage. First Federal agreed to approve Quigley for assumption subject to the following provisions:

1. Service Charge of a five(5) point fee, no interest rate adjustment, with a one(1) year balloon payment of the entire balance of the mortgage.

OR

2. Service Charge of a Two (2) point fee, with an interest rate ajusted to 12and 3/4% from the current 8½% fixed rate.

Petitioner declined both provisions and on October 21, 1982 instituted an action for declaratory judgment and other relief against First Federal.

First Federal filed a Motion to Dismiss which was denied by the trial court on February 1, 1983.

On February 21, 1983, Quigley filed a Motion for Summary Final Judgment which was granted by the trial court on May 9, 1983.

The trial court based its holding on the fact that the subject mortgage was executed on July 23, 1976, a date prior to the effective date of the Federal Home Loan Bank Board's regulation, and that the lanuage contained in the mortgage did not constitute an enforceable due-on-sale clause.

The Second District Court of Appeal of Florida entered its opinion on February 29, 1984 (Appendix A). The decision reversed the judgment of the trial court. The Supreme Court of Florida denied a petition for review on July 5, 1984 (Appendix B).

Petitioner points out that pursuant to his sales agreement with the Cobbs, he purchased the subject property and is currently the owner of the real estate encumbered by First Federal's mortgage.

ARGUMENT

I. THE EFFECTIVE DATE OF FEDERAL HOME LOAN BANK BOARD REGULATION 12 CFR 545.8-3(f) IS JULY 31, 1976.

Rule 17.1(c) of this Court, pertaining to review on certiorari provides:

> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

It is respectfully submitted that the ruling of the court below brings this case within the purview of this section.

The effective date of Regulation 12 C.F.R. §545.6-11(f), now recodified with minor modification not relevant here as 12 C.F.R. 545.8-3(f), is July 31, 1976. The specific reference to this effective date is found in 41 FEDERAL REGISTER 18287 (Appendix C), left-hand column, starting with the thirty-second (32nd) line from the bottom, and states:

"C. Effective Date. Effective date is 7/31/76; proposal specified 5/31/76." (Appendix C)

This Court in the case of Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, 73 L. Ed. 2d 664 (1982) dealt with the issue of whether the Federal Home Loan Bank Board's due-on-sale regulation pre-empted California's Wellenkamp ruling to limit a federal savings and loan association's right to exercise a due-on-sale provision to those cases where the lender could demonstrate that the transfer had impaired its security.

When de la Cuesta first appeared in the advance sheets, this Court noted that the effective date of the due-on-sale regulation was July 31, 1976. On July 3, 1982, Mr John E. Gunther, Deputy Director of the Litigation Division, Federal Home Loan Bank Board, requested that the Court change the effective

date of the regulation to June 8, 1976 (Appendix D).

Mr. Henry C. Lind, Esq., Reporter of Decisions , wrote to Mr. Gunther on July 7, 1982, and advised him that the Court had declined to substitute the date of June 8, 1976 for July 31, 1976, but would delete reference to any effective month and day.(Appendix E)

When the de la Cuesta decision finally appeared in the bound volumes in the United States Reports, the reference to July 31, 1976 was deleted, and the opinion reflects only that the regulation was enacted in 1976. The court below reasoned that since this Court dropped the reference to July 31, 1976, the effective date had to be June 8, 1976. This result does not comport with logic and reason.

The deletion resulted from the fact that the effective month and day of the regulation was not a material issue to this Court's decision. Two of the mortgages in de la

Cuesta predated the entire year of 1976, but at the time the regulation was enacted, California had always permitted the unfettered acceleration of due-on-sale clauses. This Court had no occasion, therefore, to consider whether the effective date of 12 C.F.R. §545. 8-3(f) is June 8, 1976 or July 31, 1976.

In the instant case, the effective month and day of the regulation is a material issue which needs to be resolved because, unlike California, pre-existing Florida law prohibted the use of due-on-sale clauses absent a showing of impairment of security. See, e.g., St. Martin v. McGee, 82 So. 2d 736 (Fla. 1955), Clark v. Lachenmeier, 237 So. 2d 583 (Fla. 2d DCA 1970), Home Federal Savings & Loan Assn. of Palm Beach v. English, 249 So 2d 707 (Fla. 4th DCA 1971), Chopan v. Klinkman, 330 So. 2d 154 (Fla. 4th DCA 1976), Delgado v. Strong, 360 So. 2d 73 (Fla. 1978), First Federal Savings & LOan Assn. v. Lockwood, 385 So. 2d 156 (Fla. 2d DCA 1980),

Woodcrest Apartments Ltd., v. IPA Realty Partners, 397 So. 2d 364 (Fla. 1st DCA 1981), Consolidated Capital Properties v. National Bank of North America, 420 So. 2d 618 (Fla. 5th DCA 1982), and Orange Federal Savings & Loan Assn. v. Dykes, 433 So. 2d 642 (Fla. 5th 1983).

The lanuage of the Board's regulation creates confusion as to the effective date of the due-on-sale provision. A revision date appears in a portion of the 41 Federal Register 18287 (Appendix C) , right-hand column, commencing with the 28th line from the bottom, and provides that the revision date of §545.6-11 is effective June 8, 1976. However, since this is a restrictive regulation, a plain reading of the regulation is required and all ambiguities should be resolved against any impairment of previously vested rights.

The lower court ruled that the hiatus

period from June 8, 1976 to July 31, 1976 was justified in light of the Federal Home Loan Bank Board's view that due-on-sale provisions were already permitted under pre-1976 regulations. (Appendix A at footnote 4) However, in a footnote to the de la Cuesta opinion, this Court noted that the Board may contend that its authority for exercising the due-on-sale clauses was provided in a 1948 regulation, but apparently dismissed as without merit such reliance as it was not addressed further in the opinion. See de la Cuesta at page 147, fn. 4.

Under the decision of the court below, a six week "due-on-sale" limbo period is created which deprives petitioner of his vested rights.

It is respectfully submitted that this case clearly raises the effective date issue left open in de la Cuesta; and that the question presented warrants this Court's consideration.

II. REGULATION 12 CFR 545.8-3(f) DOES NOT PREEMPT THE EQUITY JURISDICTION OF FLORIDA COURTS.

This petition also involves the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution. The preemption doctrine emanates from the Supremacy Clause which in pertinent part reads:

> This Constitution, and the Laws of the United States which shall be made in pursuance hereof....shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

In creating our Constitution, the States surrendered certain powers to the federal government. However, the powers not surrendered to the federal government, or prohibited to the States are reserved to the states through the Tenth Amendment. The control of real property matters is one of these reserved rights.

The lower court ruled that the equity jurisdiction of Florida courts was for all intents and purposes preempted when this Court in Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982), held that California courts could not apply state law to prevent the enforcement of due-on-sale clauses. This interpretation of de la Cuesta serves to invalidate §§702.01 and 45.031 Fla. Stat. (1981), which provide that the foreclosure of mortgages is the sole province of the equity courts.

In determining whether a federal enactment precludes a state statute, the inquiry begins with congressional intent. Jones v. Rath Packing Co., 430 U.S. 519 (1977). The requisite congressional purpose to occupy the entire field of real estate mortgage law is clearly lacking in the case at bar.

Further, the interpretation and enforcement of contracts is, of course, traditionally

governed by state law. In Goldstein v. California, 412 U.S. 546 (1973), this Court held that state legislation, to be preempted, must be "absolutely and totally contradictory and repugnant" to the federal law. Id, at 553. An equitable analysis by a court of equity can not be characterized as such.

This Court has traditionally recognized that the areas of real property and mortgage law are controlled by state law. Butner v. United States, 440 U.S. 48 (1979); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Sunderland v. United States, 266 U.S. 226 (1924). In addition, since federal courts can not in the absence of normal diversity requirements handle state mortgage foreclosure actions, the application of the state court's equity powers, or the discretionary withholding of those powers, is not subject to preemption. There is a distinct difference between not respecting federal law and withholding an equitable

remedy. The decision of the trial court in the instant case was based on an interpretation of a mortgage provision, and not on whether there was an impairment of collateral.

The court below ruled that the subject mortgage contained an enforceable due-on-sale clause. This ruling was based on the misconception that de la Cuesta did not require one specifically worded and concise due-on-sale provision.

In direct contrast to the absence of any due-on-sale lanuage in the subject mortgage, is the concise due-on-sale clause used in most mortgages and designated as Paragraph 17. Paragraph 17 is contained in the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and Federal National Mortgage Association and reads:

> If all or any part of the property is sold or transfered by Borrower without Lender's prior consent, excluding (a) the creation of a lein or encumbrance subordinate to this Mortgage, (b) the creatrin of a purchase

> money security interest for household appliances, (c) a transfer by devise, descent, or by operation of law upon death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable. See, e.g., FNMA/FHLMC Uniform Instrument 6175.

Paragraph 17 is quoted in de la Cuesta as containing the required due-on-sale lanuage See footnote 2, 458 U.S. 145. Although paragraph 17 is not the only type of due-on-sale clause that allows for acceleration of the maturity of the debt, the validity of other clauses depends upon whether the clause includes one clear provision for the lender to declare all sums due and payable upon a transfer of the property without its consent. The subject mortgage shows on its face that it fails to meet the de la Cuesta criteria.

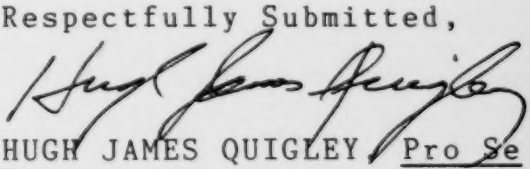
More than one individual's rights are involved. Unless reversed, the decision of

the lower court sets the stage for allowing acceleration of the maturity of mortgage debts regardless of whether the mortgage contains a due-on-sale provison as defined in de la Cuesta.

CONCLUSION

For the foregoing reasons it is respectfully suggested that a writ of certiorari issue to review the judgment and opinion of the Second District Court of Appeal of the State of Floirda.

Respectfully Submitted,



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APPENDIX

APPENDIX A

OPINION OF THE DISTRICT COURT OF APPEAL

OF FLORIDA, SECOND DISTRICT
(The Court Below)

(Reported At 445 So. 2d 1052)

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation, Appellant, v. HUGH JAMES QUIGLEY, Appellee.

IN THE DISTRICT COURT

OF APPEAL OF FLORIDA

SECOND DISTRICT

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation,

Appellant,

v.

HUGH JAMES QUIGLEY,

Appellee.

CASE NO. 83-1203

Opinion filed Februaryl, 1984.

Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge.

Roy C. Summerlin and Debra L. Cline of Summerlin, Connor, and Braisted, Winter Haven, for Appellant.

Hugh James Quigley, Lake Wales, pro se.

GRIMES, Judge.

Once again we consider the effectiveness of a due-on-sale clause contained in a federal savings and loan association mortgage.

On July 23, 1976, Jack and Lillian Cobb gave First Federal Savings and Loan Association of Winter Haven (First Federal) a mortgage on their home. The mortgage contained the following paragraphs:

> 7. No conveyance of said property, or any part thereof, shall be made by Mortgagor without the written consent of Mortgagee and without assumption by the grantee in the form prescribed by Mortgagee of the obligation to Mortgagee hereunder. In any event Mortgagee may, upon such conveyance by Mortgagor, deal directly with Mortgagor's grantee without any notice to Mortgagor in all respects pertaining to this mortgage, and may forbear to sue or may extend times for payment of the debt secured hereby without discharging or in any way affecting the liability of Mortgagor hereunder.
>
> 23. If said note, or the interest thereon, or any of the sums of money herein referred to or secured hereby are not fully paid within thirty days after same, or any of them, become due and payable, or if each covenant, agreement, condition and stipulation of said note and this mortgage, or all of them, are not duly performed, complied with and abided by for a period of thirty days, Mortgagee

> shall have the option to accelerate the payment of the entire principal sum, with interest, as immediately due and payable without notice.

On April 25, 1982, Hugh J. Quigley (Quigley) contracted to buy the Cobbs' home. The purchase contract contained the folowing provision:

> Purchaser shall make application to FIRST FEDERAL SAVINGS & LOAN OF W. H. for the purpose of qualifying for the assumption of the existing first mortgage held by said bank, in the approximate balance of $43,500.00, and which has approximately 15 years to run, provided, however, that said first mortgage does not escalate above 8-1/2% per annum in its interest rate. The balance of the principal price in the form of a purchase money second mortgage which Seller sgrees to take back, for a period of fifteen (15) years, amortized on equal monthly installments, including principal and interest at the rate of 10% per annum. In the event either of the above-mentioned mortgages are not forthcoming, Buyer shall have the right to cancel this contract and receive immediate return of all deposit monies....

Quigley applied to First Federal for approval of assumption of the mortgage. First

Federal agreed to approve Quigley for assumption subject to the following options:

1. Service Charge 5 Point Fee, No Interest Rate adjustment, 1 year Balloon Payment

OR

2. Service Charge 2 Point Fee, Interest Rate adjusted to 12 3/4 % fixed rate.

First Federal also advised Quigley that should he consummate the sale without its approval, the mortgage would be accelerated. Rather than going forward with the purchase, Quigley brought a declaratory judgment action against First Federal.

While the suit was pending, the United States Supreme Court in Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982), rendered a sweeping decision determining that a Federal Home Loan Bank Board regualtion which permitted federal savings and loan associations to use due-on-sale clauses in their mortgages preempted

California law. Notwithstanding, the trial court enterd summary judgment for Quigley, holding that First Federal's due-on-sale clause could not be accelerated by virtue of the sale of the property and that First Federal could not condition its approval upon an increase in interest rates or the payment of mortgage loan points. First Federal appeals this ruling.[1]

The court below distinguished de la Cuesta on three grounds:

I. Mortgage executed before effective date of regulation.

The Cobbs' mortgage was executed and delivered on July 23, 1976. The court determined that the federal regulation authorizing due-on-sale clauses did not become effective until July 31, 1976. Two of the mortgages in de la Cuesta also predated the regulation, but at the time the regulation was enacted California had always permitted the unfettered acceleration of due-on-sale clauses upon the

sale of mortgaged property. It was only after the regulation was passed that the California Supreme Court first adopted a rule that due-on-sale clauses could not be enforced unless the security of the mortgage was jeopardized by the sale. Hence, the Supreme Court found it unnecessary to consider whether the regulation had retroactive effect. In the instant case, the trial court declined to give the regulation retroactive effect and concluded that, unlike California, preexisting Florida law prohibited the use of due-on-sale clauses absent a showing of impairment of security.

Actually, the regulation became effective before the mortgage was executed. When the de la Cuesta opinion first appeared in advance sheets, the Supreme Court noted that the effective date of the regulation was July 31, 1976. When the case finally appeared in the bound volumes, the reference to July 31 was dropped, and the opinion reflects only that the regulation was enacted in 1976. In

fact, the board's specific authorization for the enforcement of due-on-sale clauses is contained in 12 CFR § 545.8-3(f) (1982),[2] which became effective on June 8, 1976. 41 Fed. Reg. 18287 (1976). The confusion resulted because subsection (g) of the regulation which contains certain limitations on due-on-sale clauses in mortgages executed after July 31, 1976, was enacted to become effective on July 31, 1976.[3]

II. Lanuage of the mortgage does not constitute an enforceable due-on-sale clause.

The court also held that First Federal's due-on-sale clause could not be enforced because it did not contain the limitations required by subsection (g) of the regulation. Yet, subsection (g) did not become effective until July 31, 1976. The Cobb mortgage was executed during that short period of time in which due-on-sale clauses were specifically authorized without any limitations.[4] However, Quigley cannot complain because even

if subsection (g) had been in effect, none of its limitations would have been applicable to this transaction.

The due-on-sale clause most often used in loan instruments is paragraph 17 of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which is quoted in the de la Cuesta opinion. Quigley's argument that the lanuage of First Federal's mortgage fatally departed from the customary wording of due-on-sale clauses can not be sustained because de la Cuesta defined a due-on-sale clause as "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." 458 U.S. at 145, 102 S. Ct. at 3018, 73 L. Ed. 2d at 670. Paragraph 7 of the Quigley mortgage provided that the mortgaged property should not be

conveyed without the written consent of the mortgagee, and paragraph 23 specified that upon the failure to comply with any condition of the mortgage, the mortgagee had the option to accelerate payment of the entire unpaid balance. Regardless of the form of the lanuage, when read together, these provisions constitute a due-on-sale clause.

III. State courts' equity jurisdiction not subject to preemption.

Finally, the trial court reasoned that one who seeks to foreclose a mortgage in a state court must accept the equitable doctrines recognized by that court. Our court had originally adopted this analysis in First Federal Savings & Loan Association v. Lockwood, 385 So. 2d 156 (Fla. 2d DCA 1980), when we held that a state trial court could deny a federal savings and loan assocaition the right to enforce a due-on-sale clause absent an impairment of security. However, our view on preemption was clearly overruled in de la

Cuesta when the Supreme Court held that the California courts could not apply state law to prevent the enforcement of due-on-sale clauses in federal savings and loan association mortgages. Thus, we recently reversed the refusal to enforce a due-on-sale clause contained in such a mortgage. First Home Federal Savings & LOan Association v. Nance, 436 So. 2d 805 (Fla. 2d DCA 1983). See Washington Savings & Loan Association v. Concepcion del Portillo, 419 SO. 2d 805 (Fla. 3d DCA 1982), in which our sister court interpreted the de la Cuesta decision in a similar manner.

The summary judgment for Quigley is reversed. We also reverse the court's determination, attacked on cross appeal, that First Federal is entitled to charge a nominal transfer fee to cover the cost of changing its records to reflect a new ownership. This point was never an issue between the parties,

and there was no evidence introduced to support the court's conclusion that it was a routine and customary practice of savings and loan associations to charge a nominal transfer fee.

OTT, C.J., and CAMPBELL, J., Concur.

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1. The court'sdetermination that Quigley had the requisite standing to sue has not been challenged on this appeal.

2. 12 CFR §545.8-3(f) (1982) provides:

> (f) Due-on-sale clauses. An association continues to have the power to include, as a matter of contract between it and the borrower a provision in its loan instrument whereby the associaition may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to laons made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the

association and borrower shall be fixed and governed by that contract.

3. References to paragraphs (d) and (e) of the regulation suggest the reason for the differences in dates. Paragraph (d) pertaining to late charges was made effective on June 8, 1976, but an explanatory note in 41 Fed. Reg. 18287 (1986) points out that the effective date of paragraph (e) relating to limitations on late charges was delayed until July 31, 1976, to allow for an orderly transition and alteration of mortgage forms. Presumably the same rationale prompted the delay in the effective date of paragraph (g) concerning limitations in the due-on-sale clauses.

4. Evidently, the Federal Home Bank Board was not troubled over the creation of a hiatus period because of its view that due-on-sale clauses were already permitted under prior regulations. See de la Cuesta, 458 U.S. at 147, 102 S. Ct. at 3019, 73 L. Ed. 2d at 671.

APPENDIX B

SUPREME COURT OF FLORIDA

THURSDAY, JULY 5, 1984

HUGH JAMES QUIGLEY,	)	
Petitioner,	)	
vs.	)	CASE NO. 65,115
FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN,	)	
Respondent.	)	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

ADKINS, ACTING C.J., OVERTON, MCDONALD, EHRLICH and SHAW, JJ., Concur

18286 FEDERAL REGISTER VOL. 41, NO 86

RULES AND REGULATIONS

CHAPTER V--FEDERAL HOME LOAN BANK BOARD
[No.76-296]

PART 545--OPERATIONS

PART 556--STATEMENT OF POLICY

Amendments Relating to Late Charges and Due-on-Sale Clauses

Summary. The following summary of the amendmentsadopted by this Resolution is provided for the reader's convenience and is subject to the full explanation in the following preamble and to the specific provisions of the amendments.

I. Present Situation. The Federal Home Loan Bank Board permits Federal associations, if authorized by their loan contracts, to assess, impose, and collect late charges respecting delinquent periodic installment payments on such loans, and to declare the loan immediately due and payable if the borrower sells or transfers the real property securing the

loan without the consent of the association.

II. Final Amendment. A. A Federal association continues to be empowered to include as a matter of contract between it and the borrower, provisions in its loan contracts for assessment, imposition, and collection of a late charge respecting any deliquent periodic installment payment; and for the acceleration of the maturity of the loan, at the option of the association, if the borrower sells or transfers the loan security property without prior written consent of the association.

B. Limits are placed on the imposition and maximum amount of late charges, which may be collected by a Federal association on future loans secured by borrower-occupied homes.

C. Restrictions are placed on exercise of acceleration (due-on-sale) clauses contained in future loan contracts secured by borrower-occupied homes.

III. Differencs from Proposal. A. Late charges 1. A late charge may be imposed if an installment payment is not received by the associaiton within the grace period; proposal used date-of-payment concept, including payment by deposit in the mail.

2. The alternative seven day delinquency notice requirement in proposal is deleted; associations are required to make disclosure of late charge provision in any monthly billings.

3. A new statement of Policy is issued regarding disclosureand imposition of late charges in connection with existing loans.

B. Due-on-sale Clauses. A new Statement of Policy is issued regarding exercise of due-on-sale clauses and loans asssumptions.

C. Effective Date. Effective date is 7/31/76; proposal specified 5/31/76.

By Resolution No. 76-100 of February 6, 1976 the Federal Home Loan Bank Board proposed to amend §545.6-11 of the Rules and Regulations

for the Federal Savings and Loan System (12 CFR 545.6-11) for the purposes of clarifying and limiting the authority of Federal savings and loan associations in the area of late charges and due-on-sale clauses. Notice of such proposed rulemaking was duly published in the FEDERAL REGISTER on February 12, 1976 (41FR 6283-6287) with an invitation for interested persons to submit comments by March 22, 1976. On the basis of all relevant material presented by interested persons and otherwise available, the Board heeby adopts the changes as proposed, with modifications discussed below.

New paragraph (d) setting forth the authority of Federal associations to impose and collect late charges, is adopted substantially as proposed, except for a changed date reference.

Paragraph (e) - relating to limitations on late charges is adopted substantially as proposed, with certain modifications. The effective date of the limitations is July 31, 1976, rather than May 31, 1976, as proposed, to allow for an orderly transition and alteration of mortgage forms. Periodic installemnt payments must be received by the association within the 15 day grace period (or the next business day, if such grace period ends on a weekend or holiday) to avoid imposition of late charges, the proposal would have exempted installment payments deposited in the mail during the grace period. The modification is intended to alleviate confusion and expense related to ascertainment of payment date. Paragraph (e) provides further that any monthly billing coupon or other notice which an association may provide regarding installment payments due shall disclose the date after which a late charge may be assessed. The proposal would have required a seven day

notice as an alternative to disclosure through monthly billing, but the Board is persuaded that such notice is unnecessary in light of the disclosure made at other times by Federal associations, including disclosure at the time of loan closing. Paragraph 556.9(a) of the new statement of Policy adopted today, emphasizes the duty of associations to disclose this information.

Subdivision (e) (1) (iv) of §545.6-11 provides that late charges may not be assessed more than one time for the late payemnt of any one installment; this is unchanged from the proposal and menas that a borrower bringing current a loan which is 90 days delinquent could not be required to pay three late charges on the payment 90 days overdue, two late charges on the payment 60 days overdue, and one late charge on the payment 30 days overdue, but rather three late charges in all. Subdivision 545.6-11(e)(2)

provides that installment payments must be applied to the longest outstanding installment due; this is unchanged form the proposal and means that, in the example of the loan 90 days delinquent, the first payment is applied to the installment 90 days in arrears, the next to the installment 60 days in arrears, etc.

The last sentence of proposed paragraph (e) relating to limitations and restrictions on late charges imposed on loans made before July 31, 1976, has been removed form this provision and appears as part of the new Statement of Policy adopted herein at §556.9 (b).

Paragraphs (f) and (g) of §545.6-11, relating to Federal associations' authority regarding due-on-sale clauses are adopted substantially as proposed, with some portions re-written or re-numbered for clarification purposes only. The effective date of the limitations is July 31, 1976.

A ne Statement of Policy clarifying and interpreting the Board's policies pertaining to late charges and due-on-sale clauses is adopted by the Board at §556.9. Paragraph (a) expresses the Board's view that all contract terms affecting the borrower should be fully disclosed no later than the time of ioan closing. Paragraph (b) states that the Board disfavors the practice of imposing prepayment charges upon exercise of due-on-sale clauses with regard to laons made prior to August 1, 1976, on the security of borrower-occupied homes, and urges associations to curtail this practice in connection with such earlier loans in the absence of extraordinary circumstances. Paragraph (b) (2) describes considerations relevant to impositionof late charges with regard to laons made prior to August 1, 1976. Paragraph (c) expresses the Board's view that there may be circumstances other than those described in §545.6-11(g)(1) where an association should

consider waiver of its acceleration option. Paragraph (d) states the Board's expectation that in transactions covered by the loan assumption provision of §545.6-11(g)(3), associations should not increase interest rates in excess ofcurrent market interest rates for comparable loans made by the associations applying their normal underwriting standards. New paragraph (e) states the Board's interpretation with respect to maintenance of mortgage insurance in connection with the requirement of paragraph 545.6-11(g)(3).

Finally, it was and is the Board's intent to have late charges and due-on-ale practices of Federal associations governed exclusively by Federal law. Therefore, charging of late charges, and exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by §545.6-11 and the Board's new Statement of Policy. Federal

associations shall not be bound by or subject to any conflicting State law whcih imposes different late chargs or due-on-sale requirements, nor shall Federal associations attempt to impose a higher late charge than permitted in §545.6-11(e) or avoid the limitations on the exercise of due-on-sale clauses delineated in §545.6-11(g) on the ground that such higher charge or avoidance of limitations is permissible under State law.

Accordingly, the Board hereby revises §545.6-11 and adds §556.9 to read as set forth below, effective June 8, 1976.

APPENDIX D

July 3, 1982

Henry C. Lind, Esq.
Reporter of Decisions
Supreme Court of the United States
Washington, D.C. 20543

Re: Fidelity Federal Savings and Loan Association v.De La Cuesta, No. 81-750 (June 28, 1982)

Dear Mr. Lind:

Pursuant to our conversation yesterday, I am writing on behalf of the Federal Home Loan Bank Board ("Board"), an amicus in the captioned case, to request that the Supreme Court of the United States correct a minor error in its June 28, 1982 Opinion.

On pages 4, 13 (fn.11) and 28 (fn.24) the Opinion states that the Board's regulation specifically authorizing due-on-sale clauses, 12 C.F.R. §545.6-11 (f) (now found at 12 C.F.R. §545.8-3 (f), became effective on July 31, 1976. However the Board's Resolution adopting this regulation indicates that while the new restrictions in section (g) of the regulation became effective on July 31, 1976, 1/ the Board's specific authorization of enforcement of due-on-sale clauses contained in section (f) of the regulation, became effective on June 8, 1976. 2/ See 41 Fed. Reg. 18286-8. A copy of Board resolution No. 76-296 (April 28, 1976) and the pages of the Federal Register where the Resolution can be found are enclosed for the Court's convenience, with emphasis added.

1/ The Resolution states the "[t]he effective date of the limitations is July 31, 1976" and 12 C.F.R. §545.6-11 (f) and (g) repeatedly stated that the limitations apply "with respect to loans made after July 31, 1976." See 41 Fed. Reg. at 18287, 18288.

2/ The Resolution states that "the Board hereby revises § 545.6-11...to read as set forth below, effective June 8, 1976." See 41 Fed. Reg. 18287.

Because this minor mistake in the Opinion potentially could affect the public, the Board respectfully requests that the Court correct it. Thank you for your kind attention.

Very truly yours,

John E. Gunther
Deputy Director
Litigation Division

cc: Fred Crane, Esq.
Ernest Leff, Esq.

APPENDIX E

July 7, 1982

Mr John E. Gunther
Deputy Director
Litigation Division
Federal Home Loan Bank Board
1700 G Street, N.W.
Washington, D.C. 20552

Re: Fidelity Federal Savings and Loan Assn. v. de la Cuesta, No.81-750

Dear Mr. Gunther:

I am in receipt of your letter of July 3, 1982, regarding the above case. I referred it to Justice Blackmun, and I am authorized to inform you that the following changes are being made in the opinion prior to its publication in the United States Reports.

The first sentence on page 4 of the slip opinion is being amended as follows:

> Accordingly, the Board issued a regulation in 1976 governing due-on-sale clauses.

The first sentence in footnote 24 on page 28 of the slip opinion is being revised as follows:

> Pointing out that two of the deeds of trust were executed prior to the 1976 effective date of §545.8-3(f), appellees argue that the due-on-sale

regulation may not be applied
so as to destroy vested rights.

Very truly yours,

Henry C. Lind
Reporter of Decisions

NO. 84-534 (2)

Office-Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HUGH JAMES QUIGLEY,

Petitioner,

versus

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WINTER HAVEN, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE SECOND DISTRICT COURT OF APPEAL IN AND FOR THE STATE OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Roy C. Summerlin
Debra L. Cline
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Attorneys for Respondent

BEST AVAILABLE COPY

37pp

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED BELOW

The Tenth Circuit Court in and for Polk County, Florida rendered its Final Summary Judgment in favor of Petitioner on May 9, 1983 in *Hugh James Quigley v. First Federal Savings and Loan Association of Winter Haven,* Case Number GC-G-82-3024. On February 1, 1984, the Second District Court of Appeal for Florida rendered its Opinion reversing the above referenced decision of the Circuit Court in the case of *First Federal Savings and Loan Association of Winter Haven v. Hugh James Quigley*, 445 So.2d 1052 (Fla. 2d DCA 1984) rehearing denied February 29, 1984. The Florida Supreme Court rendered its decision declining to accept jurisdiction for review of the Second District Court of Appeal's Opinion on July 5, 1984 in the case of *Hugh James Quigley v. First Federal Savings and Loan Association of Winter Haven,* Case Number 83-1203.

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I

REGULATIONS INVOLVED IN THE CASE

This case involves the Federal Home Loan Bank Board's "due-on-sale" Regulation found in 12 C.F.R. §545.8-3, formerly 12 C.F.R. §545.6-11. This Regulation is set out verbatim in the Appendix attached to this Brief. See Appendix, pages A-9 to A-18.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case presented by Petitioner, with the exception of the following:

In addition to containing Paragraph 7 as set forth in Petitioner's Statement of the Case, the mortgage also contained the following provision in Paragraph 23, to wit:

> "23. If the said note, or the interest thereon, or any of the sums of money herein referred to or secured hereby are not fully paid within thirty days after the same, or any of them, become due and payable, or if each covenant, agreement, condition and stipulation of said note and this mortgage, or all of them, are not duly performed, complied with and abided by for a period of thirty days, Mortgagee shall have the option to accelerate the payment of the entire principal sum, with interest, as immediately due and payable without notice."

SUMMARY OF ARGUMENT

ARGUMENT I

THE EFFECTIVE DATE OF REGULATION 12 C. F. R. §545.8-3(f) DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW SO AS TO JUSTIFY THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION

Even though the Supreme Court has not ruled on a specific effective date for 12 C. F. R. §545.8-3(f), the date is clearly apparent from a report of the Regulation contained in 41 Federal Register, 18287. Since the effective date is so easily determined, it does not constitute such an "important Federal question" that it would cause this Court to consider it an issue for review under a Writ of Certiorari.

ARGUMENT II

THE PREEMPTIVE EFFECT OF REGULATION 12 C.F.R. §545.8-3(f) HAS BEEN EFFECTIVELY DECIDED BY THIS COURT

The landmark case of *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed. 2d 664 (1982) decided by this Court on June 28, 1982 effectively laid to rest the question of the preemptive effect of 12 C. F. R. §545.8-3(f). The Supreme Court held that this Regulation did preempt contrary State law. Since this Court has already decided this question, it is unnecessary for this Court to again extend its discretionary jurisdiction to consider the same issue.

ARGUMENT I

THE EFFECTIVE DATE OF REGULATION 12 C. F. R. §545.8-3(f) DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW SO AS TO JUSTIFY THIS COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION.

Under Rule 17.1(c), Rules of the Supreme Court of the United States, this Court will consider whether or not a State Court has decided an "*important* question of Federal law" (emphasis added) in deciding to exercise its judicial discretion by granting a Writ of Certiorari.

The question therefore, is whether or not the effective date of a Federal Regulation gives rise to a question so "important" that it must be reviewed by this Court.

The Regulation in question is 12 C. F. R. §545.8-3(f), formerly 12 C. F. R. §545.6-11(f), or the so-called "due-on-sale" Regulation promulgated by the Federal Home Loan Bank Board under the authority of Section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464(a). This Regulation was the subject of this Court's decision in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L.Ed. 2d 664 (1982).

When *de la Cuesta* first appeared in the Advance Sheets, this Court noted the effective date of the Regulation as being July 31, 1976. When the case finally appeared in the bound volumes, the reference to July 31, 1976 was dropped and the Opinion reflects only that the Regulation was enacted in 1976. See 458 U. S. at pages 146 and 170.

The Second District Court of Appeal for the State of Florida in the case *sub judice* held the effective date of the "due-on-sale" Regulation to be June 8, 1976 (Appendix, page A-5). The Court below based this finding on the authority of the Federal Register wherein the Federal Home Loan Bank Board's resolution concerning this Regulation is set forth. 41 Federal Register 18287, commencing with the twenty-eighth (28th) line from the bottom, right-hand column, states as follows:

> "Accordingly, the Board hereby revises Section 546.6-11 and adds Section 556.9 to read as set forth below, effective *June 8, 1976."* (emphasis added)

Immediately following the above language, there is set forth the "due-on-sale" Regulation as considered by this Court in *del la Cuesta.*

The July 31, 1976 date relied upon by Petitioner is the effective date of the *limitations* on due-on-sale clauses as contained in 12 C.F.R. §545.8-3(g). The Court below suggested that the reason for the different effective dates for subsections (f) and (g) of the Regulation was to allow for an orderly transition and alteration of mortgage forms. (see Appendix, page A-6; footnote No. 3)

Petitioner urges this Court to exercise its discretionary jurisdiction because the case *sub judice* raises "an important Federal question." The decision to exercise jurisdiction upon this basis is essentially a subjective quality decision which was addressed by this Court in the case of *Equitable Life Assurance Society v. Brown,* 23 S.Ct. 123, 187 U.S. 308, 47 L.Ed. 190 (1902), wherein it was stated:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real and not a merely formal Federal question is essential to the jurisdiction of this Court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appears that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail." (See 187 U.S. 308 at page 311)

See also *Zucht v. King*, 43 S.Ct. 24, 260 U.S. 174, 67 L. Ed. 194 (1922).

At point here is the limited question of the effective date of the Federal Regulation. The question is undoubtedly Federal in nature, but because of the clear language of the promulgating authority's resolution adopting the Regulation, it becomes merely a question of form, rather than substance.

Additionally, the one other Court that has had occasion to consider this question had no difficulty finding the effective date of the Regulation to be June 8, 1976. See *Glendale Federal Savings and Loan Association v. Fox*, 459 F. Supp. 903 (DC Calif. 1978), wherein the Court stated:

> "The Bank Board has promulgated specific regulations regarding provisions which a Federal savings and loan association shall and may include in its loan contracts. 12 C.F.R. §545.6-11. With respect to the use of 'due-on-sale' clauses by Federal savings and loan associations, the Bank Board, in April, 1976, adopted certain amendments specifically authorizing the use of such clauses in prescribing certain limitations on their exercise. 12 C.F.R. §545.6-11(f) and (g). These regulations, *which became effective June 8, 1976,* state in pertinent part . . ." (see page 904) (emphasis supplied)

In conclusion, Respondent urges the Court to decline its discretionary jurisdiction for the reason that the issue raised does not present an "important Federal question."

ARGUMENT II

THE PREEMPTIVE EFFECT OF REGULATION 12 C.F.R. §545.8-3(f) HAS BEEN EFFECTIVELY DECIDED BY THIS COURT

The second theory which Petitioner advances as a basis for the exercise of this Court's "important Federal question" jurisdiction is that the lower State Court in the case *sub judice* improperly found that 12 C.F.R. §545.8-3, formerly 12 C.F.R. §545.6-11, preempted State law.

The non-preemptive effect of this Federal regulation is an argument that had been raised repeatedly prior to this Court's decision in *de la Cuesta*. The argument was the central focus of much due-on-sale litigation instituted by and against Federal savings and loan associations and, prior to *de la Cuesta*, was the subject of many contradictory State and Federal Court decisions.

In addressing the question in *de la Cuesta*, this Court took account of Congressional intent and the language of the Regulation and found that 12 C.F.R. §545.8-3(f) clearly preempts State law. As the Court stated:

> "Thus, we conclude that the Board's due-on-sale regulation was meant to preempt conflicting State limitations on the due-on-sale practices of Federal savings and loans and that the California Supreme Court's decision in *Wellenkamp* creates such a conflict." 141 U.S. at 159

Since June 28, 1982, the date the Supreme Court rendered its decision in *Fidelity Federal Savings and Loan Association*

v. de la Cuesta, Courts have uniformly followed this Court's finding and have allowed Federal savings and loan associations to exercise due-on-sale clauses. See, for example, *Independent Federal Savings and Loan Association v. Davis*, 646 S.W. 2d 336 (Ark. 1983), *First Home Federal Savings and Loan Association v. Nance*, 436 So. 2d 805 (Fla. 2nd DCA 1983), *Washington Federal Savings and Loan Association of Florida, a Division of Citizens Savings, a Federal Savings and Loan Association, v. Del Portillo*, 419 So. 2d 805 (Fla. 3rd DCA 1982), *Lindenburg v. First Federal Savings and Loan*, 691 F.2d 974 (11th Cir. 1982), *Egbert v. Freedom Federal Savings and Loan Association*, 14 Mass. App. 383, 440 N.E. 2d 22 (Mass. App. Ct. 1982). The lower Court in the case *sub judice* simply followed the dictates of this Court as found in *de la Cuesta*.

The case *sub judice* involves a post-regulation mortgage originated by a Federal savings and loan association containing a due-on-sale provision qualifying under the definition set forth by this Court in *de la Cuesta*. The lower Court, relying heavily on *de la Cuesta*, has found that the due-on-sale Regulation preempted any State law to the contrary and that Respondent held a mortgage with an enforceable due-on-sale clause.

If Petitioner's "non-preemptive" argument were adopted, the thurst of *de la Cuesta* would be mutilated. Petitioner apparently wants to re-argue *de la Cuesta*. That is not legitimate ground for Certiorari.

Inasmuch as this question has been "so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy", the issue raised by Petitioner does not involve an "important question of Federal law" and thus, this Court should decline to accept jurisdiction. See *Equitable Life Assurance Society v. Brown, supra*, at page 311.

CONCLUSION

In conclusion, Respondent suggests that jurisdiction does not lie for the following reasons:

1. The effective date of 12 C.F.R. §545.8-3(f) does not constitute such an "important Federal question" as to cause this Court to exercise its discretionary jurisdiction under 28 U.S.C. §1257(3).

2. This Court has previously decided in *de la Cuesta*, supra, that 12 C.F.R. §545.8-3(f) preempts any State law to the contrary.

RESPECTFULLY SUBMITTED,

SUMMERLIN AND CONNOR

Roy C. Summerlin

ROY C. SUMMERLIN

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DEBRA L. CLINE
Post Office Drawer 798
Winter Haven, Florida 33882-0798
Telephone No. 813-294-4181
Attorneys for Respondent

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three (3) true and correct copies of the above and foregoing were mailed to Petitioner, HUGH JAMES QUIGLEY, Post Office Box 2344, Lake Wales, Florida, 33853, Petitioner on the 2nd day of November, 1984.

Roy C. Summerlin p.m.s.

ROY C. SUMMERLIN

Debra L. Cline p.m.s.

DEBRA L. CLINE

APPENDIX I

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

FIRST FEDERAL SAVINGS AND
LOAN ASSOCIATION OF WINTER
HAVEN, a corporation,

Appellant,

v.

HUGH JAMES QUIGLEY,

Appellee.

CASE NO. 83-1203

Opinion filed February 1, 1984.

Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge.

Roy C. Summerlin and Debra L. Cline of Summerlin, Connor and Braisted, Winter Haven, for Appellant.

Hugh James Quigley, Lake Wales, Pro Se.

GRIMES, Judge.

Once again we consider the effectiveness of a due-on-sale clause contained in a federal savings and loan association mortgage.

On July 23, 1976, Jack and Lillian Cobb gave First Federal Savings and Loan Association of Winter Haven (First Federal) a mortgage on their home. The mortgage contained the following paragraphs:

7. No conveyance of said property, or any part thereof, shall be made by Mortgagor without the written consent of Mortgagee and without assumption by the grantee in the form prescribed by Mortgagee of the obligation to Mortgagee hereunder. In any event Mortgagee may, upon such conveyance by Mortgagor, deal directly with Mortgagor's grantee without any notice to Mortgagor in all respects pertaining to this mortgage, and may forbear to sue or may extend times for payment of the debt secured hereby without discharging or in any way affecting the liability of Mortgagor hereunder.

23. If said note, or the interest thereon, or any of the sums of money herein referred to or secured hereby are not fully paid within thirty days after the same, or any of them, become due and payable, or if each covenant, agreement, condition and stipulation of said note and this mortgage, or all of them, are not duly performed, complied with and abided by for a period of thirty days, Mortgagee shall have the option to accelerate the payment of the entire principal sum, with interest, as immediately due and payable without notice.

On April 25, 1982, Hugh J. Quigley (Quigley) contracted to buy the Cobbs' home. The purchase contract contained the following provision:

> Purchaser shall make application to FIRST FEDERAL SAVINGS & LOAN OF W. H.

> for the purpose of qualifying for the assumption of the existing first mortgage held by said bank, in the approximate balance of $43,500.00, and which has approximately 15 years to run, provided, however, that said first mortgage does not escalate above 8–½% per annum in its interest rate. The balance of the principal price in the form of a purchase money second mortgage which the Seller agrees to take back, for a period of fifteen (15) years, amortized on equal monthly installments, including principal and interest at the rate of 10% per annum. In the event either of the above-mentioned mortgages are not forthcoming, Buyer shall have the right to cancel this contract and receive immediate return of all deposit monies. . . .

Quigley applied to First Federal for approval of assumption of the mortgage. First Federal agreed to approve Quigley for assumption subject to the following options:

1. Service Charge 5 Point Fee, No Interest Rate adjustment, 1 year Balloon Payment

OR

2. Service Charge 2 Point Fee, Interest Rate adjusted to 12 ¾% fixed rate.

First Federal also advised Quigley that should he consummate the sale without its approval, the mortgage would be accelerated. Rather than going forward with the purchase. Quigley brought a declaratory judgment action against First Federal.

While the suit was pending, the United States Supreme Court in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), rendered a sweeping decision determining that a Federal Home Loan Bank Board regulation which permitted federal savings and loan associations to use due-on-sale clauses in their mortgages preempted California law. Notwithstanding, the trial court entered summary judgment for Quigley, holding that First Federal's due-on-sale clause could not be accelerated by virtue of the sale of the property and that First Federal could not condition its approval upon an increase in interest rates or the payment of mortgage loan points. First Federal appeals this ruling.[1]

The court below distinguished *de la Cuesta* on three grounds:

1. *Mortgage executed before effective date of regulation.*

The Cobbs' mortgage was executed and delivered on July 23, 1976. The court determined that the federal regulation authorizing due-on-sale clauses did not become effective until July 31, 1976. Two of the mortgages in *de la Cuesta* also predated the regulation, but at the time the regulation was enacted California had always permitted the unfettered acceleration of due-on-sale clauses upon the sale of mortgaged property. It was only after the regulation was passed that the California Supreme Court first adopted a rule that due-on-sale clauses could not be enforced unless the security of the mortgage was jeopardized by the sale. Hence, the Supreme Court found it unnecessary to consider whether

---

1. The court's determination that Quigley had the requisite standing to sue has not been challenged on this appeal.

the regulation had retroactive effect. In the instant case, the trial court declined to give the regulation retroactive effect and concluded that, unlike California, preexisting Florida law prohibited the use of due-on-sale clauses absent a showing of impairment of security.

Actually, the regulation became effective before the mortgage was executed. When the *de la Cuesta* opinion first appeared in advance sheets, the Supreme Court noted that the effective date of the regulation was July 31, 1976. When the case finally appeared in the bound volumes, the reference to July 31 was dropped, and the opinion reflects only that the regulation was enacted in 1976. In fact, the board's specific authorization for the enforcement of due-on-sale clauses is contained in 12 CFR §545. 8-3(f) (1982),[2] which became effective on June 8, 1976. 41 Fed. Reg. 18287 (1976). The confusion resulted because subsection (g) of the regulation which contains certain limitations on

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2. 12 CFR §545. 8-3(f) (1982) provides:

> (f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

due-on-sale clauses in mortgages executed after July 31, 1976, was enacted to become effective on July 31, 1976.[3]

II. *Language of the mortgage does not constitute an enforceable due-on-sale clause.*

The court also held that First Federal's due-on-sale clause could not be enforced because it did not contain the limitations required by subsection (g) of the regulation. Yet, subsection (g) did not become effective until July 31, 1976. The Cobb mortgage was executed during that short period of time in which due-on-sale clauses were specifically authorized without any limitations.[4] However, Quigley cannot complain because even if subsection (g) had been in effect, none of its limitations would have been applicable to this transaction.

The due-on-sale clause most often used in loan instruments is paragraph 17 of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which is quoted in the *de la Cuesta* opinion. Quigley's argument

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3. References to paragraphs (d) and (e) of the regulation suggest the reason for the differences in dates. Paragraph (d) pertaining to late charges was made effective on June 8, 1976, but an explanatory note in 41 Fed.Reg. 18287 (1976) points out that the effective date of paragraph (e) relating to limitations on late charges was delayed until July 31, 1976, to allow for an orderly transition and alteration of mortgage forms. Presumably, the same rationale prompted the delay in the effective date of paragraph (g) concerning limitations in the due-on-sale clauses.

4. Evidently, the Federal Home Loan Bank Board was not troubled over the creation of a hiatus period because of its view that due-on-sale clauses were already permitted under prior regulations. See *de le Cuesta*, 458 U.S. at 147, 102 S.Ct. at 3019, 73 L.Ed.2d at 671.

that the language of First Federal's mortgage fatally departed from the customary wording of due-on-sale clauses cannot be sustained because *de la Cuesta* defined a due-on-sale clause as "a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred." 458 U.S. at 145, 102 S.Ct. at 3018, 73 L.Ed.2d at 670. Paragraph 7 of the Quigley mortgage provided that the mortgaged property should not be conveyed without the written consent of the mortgagee, and paragraph 23 specified that upon the failure to comply with any condition of the mortgage, the mortgage had the option to accelerate payment of the entire unpaid balance. Regardless of the form of the language, when read together, these provisions constitute a due-on-sale clause.

III. *State court's equity jurisdiction not subject to preemption.*

Finally, the trial court reasoned that one who seeks to foreclose a mortgage in a state court must accept the equitable doctrines recognized by that court. Our court had originally adopted this analysis in *First Federal Savings & Loan Association v. Lockwood,* 385 So.2d 156 (Fla. 2d DCA 1980), when we held that a state trial court could deny a federal savings and loan association the right to enforce a due-on-sale clause absent an impairment of security. However, our view on preemption was clearly overruled in *de la Cuesta* when the Supreme Court held that the California courts could not apply state law to prevent the enforcement of due-on-sale clauses in federal savings and loan association mortgages. Thus, we recently reversed the refusal to enforce a due-on-sale clause contained in such a mortgage. *First Home Federal Savings & Loan Association v. Nance*, 436 So.2d 163 (Fla. 2d DCA 1983). *See Washington*

Savings & Loan Association v. Concepcion del Portillo, 419 So.2d 805 (Fla. 3d DCA 1982), in which out sister court interpreted the *de la Cuesta* decision in a similar manner.

The summary judgment for Quigley is reversed. We also reverse the court's determination, attacked on cross-appeal, that First Federal is entitled to charge a nominal transfer fee to cover the cost of changing its records to reflect a new ownership. This point was never an issue between the parties, and there was no evidence introduced to support the court's conclusion that it was a routine and customary practice of savings and loan associations to charge a nominal transfer fee.

OTT, C. J., and CAMPBELL, J., Concur.

APPENDIX II

* * * *

sidual value, and not on the residual market value of the leased item.

(c) *Salvage powers.* If, in good faith, an association believes that there has been an unanticipated change in conditions which threatens its financial position by significantly increasing its exposure to loss, the provisions of paragraphs (a) and (b) of this section shall not prevent the association:

(1) As the owner and lessor under a net, full-payout lease, from taking reasonable and appropriate action to salvage or protect the value of the property or its interests arising under the lease; or

(2) As the assignee of a lessor's interest in a lease, from becoming the owner and lessor of the leased property pursuant to its contractual right, or from taking any reasonable and appropriate action to salvage or protect the value of the property or its interests arising under the lease.

(3) Additional terms. The provisions of paragraphs (a) and (b) of this section do not prohibit an association from including any provisions in a lease, or from making any additional agreements, to protect ints financial position or investment in the circumstances set forth in subparagraphs (1) and (2) of this paragraph (c).

[47 FR 3542, Jan. 26, 1982; 47 FR 4498, Feb. 1, 1982]

§ 545.7-11 Investment in State and local government obligations.

(a) *Definitions.* (1) "Residential real estate" – homes

(including condominiums and cooperatives), combinations of homes and business property, other dwelling units, or combinations of homes and dwelling units, including homes and business property involving only minor or incidental business use.

(2) "Obligations of or issued by the home state or political subdivisions thereof" – obligations (including loans) of or issued by the home State or political subdivisions thereof, or of or by agencies, corporations, or instrumentalities of the State or political subdivisions thereof.

(b) Any Federal association whose general reserves, surplus and undivided profits aggregate a sum in excess of 5 percent of its withdrawable accounts may invest in, or commit itself to invest in, obligations of or issued by its home State or political subdivisions thereof where the proceeds of such obligations are to be used for the rehabilitation, financing or construction of residential real estate; *Provided* (except with respect to loans), That:

(1) The obligations are rated in one of the four highest grades as shown by the most recently published rating made of such obligations by a nationally recognized investment rating service; or

(2) The obligations, if not rated, are approved by the Bank Board.

(c) The aggregate outstanding investment under this section shall not exceed the amount of the association's general reserves, surplus and undivided profits, and no more than 25 percent of that sum may be invested in obligations of or issued by any one issuer.

[44 FR 47761, Aug. 14, 1979, as amended at 47 FR 36620, Aug. 23, 1982]

GENERAL PROVISIONS RESPECTING LOANS

Source: Sections 545.8-2–545.8-11, 44 FR 39128, July 3, 1979, unless otherwise noted.

§ 545.8-2 Initial loan charge.

Except as provided in §563.35(d) of this chapter, a Federal association may require a borrower to pay necessary initial charges connected with making a loan, including the actual costs of title examination, appraisal, credit report, survey, drawing of papers, loan closing, and other necessary incidental services and costs, in such reasonable amounts as the board of directors may fix. The association may collect the charges from the borrower and pay the persons rendering services. An association also may require the payment of interest at the time of loan closing in the form of "acquisition credits," as defined in §563.23-1(g)(2) of this chapter.

[44FR 39128, July 3, 1979, as amended at 47 FR 36620, Aug. 23, 1982]

§545.8-3 Contract provisions for real estate loans.

(a) *Required and authorized provisions.* Each loan shall be evidenced by note, bond, or other instrument and be secured by a security instrument which is consistent with sound lending practices. Loan instruments shall comply with applicable provisions of law, governmental rules and regulations, and the association's charter and bylaws, and provide for full protection to the Federal association. They shall be recorded and, among other protections, shall provide specifically for full protection with respect to insurance, taxes, assessments, other governmental levies, maintenance, and repairs. They may provide for an assignment of rents. The

association may pay taxes, assessments, insurance premiums, and other similar charges for protection of its interest in the security property. If such payments are consistent with this part, they may be added to the unpaid balance of the loan. The association may require life insurance to be assigned to it by the borrower as additional collateral for a loan on the security of real estate. It may advance premiums on such life insurance and, if consistent with this part, add the premiums so advanced to the unpaid balance of the loan. A Federal association shall keep a record of the status of taxes, assessments, insurance premiums, and other charges on all real estate on which it has loans or which it owns.

(b) *Escrow accounts.* (1) An association may require that all or any part of the estimated annual taxes, assessments, insurance premiums, and other charges on any loan be paid in advance to the association in addition to interest and principal payments on the loan, to enable the association to pay such charges as they become due. With regard to any loan on the security of a home, made in whole or in part by the association, the association shall not require that the borrower deposit in any escrow account established to assure payment of taxes, assessments, insurance premiums, and other charges, (i) before or on the date of settlement, an aggregate sum in excess of *(a)* the total amount of such charges owed by the borrower and due and payable during the period ending on the due date of the first installment payment under the loan *plus (b)* one-sixth of the estimated total amount of such charges that will become due and payable during the 12-month period following the due date of the first installment payment *plus (c)* if the amounts deposited or to be deposited with the association pursuant to paragraph (1)(ii) of this paragraph (b) would be insufficient to avoid a deficiency on the due date of such charges, the amount necessary to avoid such deficiency, and (ii) beginning

with the due date of the first installment payment, the *pro rate* portion (based on the number of installment payments due during the 12-month period following the due date of the first installment) of the estimated total amount of such charges that will become due and payable during the 12-month period following the due date of the first installment payment *plus* such amount as is necessary to maintain an additional balance of one-sixth of the estimated total amount of such charges.

(2) If the association determines there will be a deficiency on the due date of such charges, it may require that additional deposits, sufficient to make up the deficiency, be submitted in equal amounts with each payment up to the date upon which such charges become due and payable. After giving the borrower notice of such deficiency and of the additional deposits required to make up the deficiency the association may deduct the necessary amounts from the borrower's regularly-scheduled installment payments if the borrower fails to make the additional deposits.

(c) *Payment of interest on escrow accounts.* (1) An association shall pay interest on an escrow account maintained in connection with a loan, if:

(i)The loan is on the security of a single-family dwelling occupied or to be occupied by the borrower;

(ii) The loan was made after June 15, 1975, and no bona fide loan commitment was made before that date; and

(iii) A specific statutory provision(s) of the State in which the security property is located generally requires State-chartered savings and loan associations, mutual savings banks, and similar institutions to pay such interest.

(2) The interest rate shall at least equal the rate required for such State-chartered institutions but shall not exceed the rate the Federal association pays on regular accounts.

(3) Unless obligated by contract, a Federal association shall have no obligation, other than under this paragraph (c), to pay interest on escrow accounts.

(d) *Late charges.* An association's loan instruments may, as a matter of contract between it and the borrower, provide for assessment, imposition, and collection of a late charge respecting payment of any delinquent periodic installment payment. The charge may be in the form of an increased rate of interest on the unpaid balance of the loan (or a part thereof) for the period of delinquency, a percentage of the delinquent periodic installment payment (or a part thereof), a fixed dollar amount, or such other form as may be necessary and appropriate to fully protect the association. No form of such late charge shall be considered as interest to the association. The association shall not deduct late charges from regular periodic installment payments on the loan, but shall collect them as such from the borrower. Except as provided in paragraph (e) of this section regarding loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, assessment, imposition, and collection of such late charges shall be exclusively governed by the terms of the loan contract. Collection of a late charge shall not impair, alter, or abrogate any other right of the association granted by contract or law respecting delinquent installment payments.

(e) *Limitations on late charges.* (1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no late charge, regardless of form, shall be assessed or collected by a Federal association:

(i) As to any periodic installment payment received by it within 15 days after the due date of such payment (if such period ends on a weekend or holiday it shall be extended to the next business day);

(ii) In a dollar amount exceeding 5 percent of the aggregate amount of principal and interest included in the deliquent periodic installment payment and in no case exceeding the amount prescribed in the loan contract;

(iii) Unless any monthly billing, coupon, or notice the association may provide regarding installment payments due on the loan discloses the date after which the charge may be assessed; or

(iv) More than one time for late payment of the same installment.

(2) Any installment payment made by the borrower shall be applied to the longest outstanding installment due.

(3) A Federal association, in an appropriate case, may elect to waive all or any portion of an authorized late charge.

(f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

(g) *Limitations on the exercise of due-on-sale clauses.* With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument,

(ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; and (3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest.

(Sec. 10, 47 Stat. 725 (12 U.S.C. 1421 et seq.) sec. 5, 48 Stat. 132 (12 U.S.C. 1464), as amended by sec. 401, 94 Stat. 160; secs. 402, 403, 407, 48 Stat. 1256, 1257, 1260, as amended (12 U.S.C. 1725, 1726, 1730), Reorg. Plan No. 3 of 1947, 12 FR 4891, 3 CFR, 1943-48 comp., p. 1071)
[44 FR 39128, July 3, 1979, as amended at 44 FR 57386, Oct. 5, 1979; 45 FR 76103, Nov. 18, 1980; 47 FR 36620, Aug. 23, 1982]

§ 545.8-4 **Servicing of loans.**

A Federal association may, except as otherwise limited by regulation, service any loan which it owns or in which it has a participation interest. It may also service for others any loan in which:

(a) It has owned any interest at any time;

(b) Any of its members owns any interest;

(c) A service corporation of the association owns any interest;

(d) The Federal Savings and Loan Insurance Corporation, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, or the Government National Mortgage Association has owned any interest at any time;

(e) The Federal Savings and Loan Insurance Corporation holds any interest as conservator, receiver, or other legal custodian of an institution it insures (whether or not the institution is in default);

(f) An institution insured by such Corporation owns any interest acquired under § 563.9 or § 563.9-1 of this chapter; or

(g) Total proceeds were disbursed, and sole ownership is retained, by a public housing corporation, or a not-for-profit private organization, established or chartered by any State or political subdivision thereof (including the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States) if: (1) The principal office or a branch office of such association is located in such State or political subdivision; (2) the sole purpose of such corporation or organization is to provide directly or indirectly for housing and incidental services, including financing, particularly for families of low or moderate income; and (3) undertaking to service such loan will not cause the total outstanding balance of all such loans serviced by such association to exceed 25 percent of its mortgage portfolio.

§ 545.8-5 Loan payments.

(a) *Initial payments on monthly installment basis and flexible payment loans.* Payments on loans made under §§ 545.6-2 and 545.6-3(a) shall begin not later than 60 days after the loan is disbursed. If such loans include construction, substantial alteration, repair, or improvement

loans, payments may begin not later than 36 months (18 months for loans secured by real estate consisting solely of one or more homes or combination of home and business property) after the date of the first disbursement, and interest shall be payable at least semiannually until regular periodic payments become due.

(b) *Loan payments and prepayments.* Payments on the principal indebtedness of all loans on real estate shall be applied directly to reduction of such indebtedness, but prepayments made on an installment loan may be reapplied from time to time wholly or

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